Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)))))))	WT Docket No. 05-211

COMMENTS OF VERIZON WIRELESS

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SUMMARY

Verizon Wireless respectfully disagrees with the Further Notice's tentative conclusion that the Commission should "restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a 'material relationship' with a 'large in-region incumbent wireless service provider.'" The Commission bases this conclusion on the assertions of a single company that are factually unsupported and in direct conflict with prior Commission policy. The Further Notice offers no evidence of harm resulting from strategic relationships between small businesses and large wireless carriers before it leaps to the proposal to restrict such relationships.

To the extent the Commission is basing its proposal on the desire to ensure that designated entities ("DEs") are "bona fide" and that only DEs benefit from bidding credits, the proposal ill fits those goals. A DE can be bona fide even if it benefits from a large carrier's investment; conversely, prohibiting investment by a large wireless carrier has nothing to do with ensuring a DE is bona fide.

If the Commission is basing its proposal on competitive concerns, nothing in the Further Notice discusses, let alone challenges or rebuts the 2005 CMRS Competition Report's finding of effective competition. In fact, restricting DEs only to the extent that they partner with literally a handful of wireless companies would not address the stated concerns of the Further Notice, but

would impose an unwarranted market restriction that would conflict with repeated finding that the CMRS market is vigorously competitive. If based on the allegations that there is harmful "consolidation" at the national level, the Further Notice's tentative conclusion is in direct conflict with the Commission's repeated conclusion that analyzing CMRS competition is properly done at the local, not the national level.

If, on the other hand, the Commission is concerned that it is unable through its own review and enforcement proceedings to address concerns that the DE program may be subject to potential abuse from larger investors, it should apply the restriction more broadly to include investment from all large companies. The choice of a $5 billion revenue threshold, however, is completely arbitrary, with no factual or public interest basis. Instead the Commission should more broadly restrict investment in DEs from any company whose gross revenues exceed $125 million annually.

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In the above-captioned Further Notice of Proposed Rulemaking,[1] the Commission proposes to change its designated entity ("DE") rules prior to its auction of spectrum for the next generation of wireless services.[2] The Commission tentatively concludes that it should prevent otherwise qualified DEs with a relationship with "large in-region incumbent service providers" from using bidding credits to acquire spectrum that overlaps the incumbent provider's existing footprint. Verizon Wireless disagrees that the DE rules should be reformed in this way. If the Commission feels compelled to make changes it should do so more broadly and effectively restrict investment from all companies

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[1] Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Further Notice of Proposed Rulemaking*, WT Docket No. 05-211, FCC 06-8 (rel. February 3, 2006) ("Further Notice").

[2] Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, *Public Notice,* DA 06-238 (rel. January 31, 2006).

with revenues greater than $125 million. Restricting DEs only to the extent that they partner with literally a handful of wireless companies would not address the stated concerns of the Further Notice, but would impose an unwarranted market restriction that would conflict with the Commission's repeated finding that the CMRS market is vigorously competitive.

I. THE COMMISSION DOES NOT IDENTIFY A PUBLIC INTEREST BASIS FOR ITS PROPOSED RESTRICTION.

It is not clear what ills the Commission is attempting to redress in this proceeding. On the thinnest of records,[3] the Commission tentatively concludes that it should modify its Part 1 rules "to restrict the award of designated entity benefits to an otherwise qualified designated entity where it has a 'material relationship' with a 'large in-region incumbent wireless service provider.'" It

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[3] It appears that the Commission is basing its tentative conclusion entirely on an *ex parte* filing by Council Tree that asserts that "following the consummation of announced mergers, the top-5 wireless carriers today will control 89 percent of United States wireless service subscribers, up from just 50 percent in 1995" and that the five largest wireless carriers and their partners dominated the most recent auction. *See* Further Notice at ¶8*,* citing Letter from Messrs. Steve C. Hillard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005) ("Council Tree *ex parte*") at 2, 13-15. Council Tree fails to mention that it previously benefited from precisely the type of relationship that it now would have the Commission effectively prohibit. In Auction No. 35, as the controlling member of Alaska Native Wireless, L.L.C. ("ANW"), Council Tree was high bidder on 44 licenses for a discounted total of $2.89 billion – the highest of any DE bidders in that auction. ANW's bids represented 17 % of all bids and, more importantly, 38 % of all DE bids in that auction. ANW's bids were discounted by $67 million dollars in the open auction and arguably hundreds of millions more in the closed auction. At the time of the auction, AT&T Wireless, with 2001 service revenues of $12.5 billion, owned nearly 40 % of ANW.

asks whether its tentative conclusion to restrict such participation will "address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities," without identifying the nature of those concerns.

If the Commission believes that there are "abuses," it needs to identify them and then craft changes to its DE rules that will target them. The best deterrent to abuses of Commission regulations is to vigilantly enforce those rules. The Commission already has at its disposal the proper tools to ensure that the relationships between DEs and their investors are legitimate and comply with well-developed Commission requirements and precedent. In order for a DE to obtain a license, both in the secondary market and in an FCC auction, it is required to reveal the nature of its agreements with its investors. In a lengthy and painstaking process prior to license grant, the Commission reviews the agreements in detail to ensure that they comply with the letter and spirit of the law. The Commission often requires the DE applicant to modify its agreements with investors to ensure that, as the Further Notice states, that only "bona fide" DEs are granted licenses.

To the extent, however, that the Commission is concerned that "bona fide" DEs are not acquiring spectrum or providing service to the public, the Further Notice's proposal is not responsive to that concern. The proposal does not alter the need for extensive review of DE agreements, nor does it address any specific concerns about potential abuse of DE relationships. Worse, the new restriction on DEs would reinvent the existing system and replace one set of complicated, but tested, standards, with innumerable shades of gray on how to evaluate a "material relationship" and areas of overlap. Such changes would undermine the Commission's longstanding goal to "to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings."[4] Furthermore, it would foreclose to DEs one specific source of experienced investment, something the Commission has never attempted to do.

II. THE FURTHER NOTICE PROVIDES NO EVIDENCE OF HARM RESULTING FROM STRATEGIC RELATIONSHIPS BETWEEN SMALL BUSINESSES AND INCUMBENT WIRELESS CARRIERS.

The Further Notice's proposal to restrict DE relationships with large wireless carriers also fails to cite evidence that any harm has resulted from strategic relationships between small businesses and large wireless carriers. Instead, its tentative conclusion appears to be based on a single entity's claims about impacts of the change in ownership of spectrum rights that has occurred since 1995 and the results of the Commission's recent PCS reauction.[5] Council

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[4] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348 (1994); at 2397, ¶ 278.

[5] Further Notice at ¶ 8, citing to Council Tree *ex parte* filing. *See also* Statement of Commissioner Jonathan S. Adelstein to Further Notice at 1 (*"*Adelstein Statement*"*). Council Tree also misconstrues the results of Auction No. 58 by suggesting that the largest carriers dominated the auction. Ten percent of all licenses in that auction were unsold, and another 20 % of the licenses were sold for the minimum bid. This clearly indicates there was room for many non-affiliated DEs, or DEs with strategic investment from "small" incumbents

Tree asserts that the large carriers' DE partners should not have access to the same benefits that would be available to Council Tree in an auction.[6] This is an argument for regulating the competitive spectrum marketplace by restricting some existing carriers' access to spectrum. As Section III of these Comments explains, this argument should be rejected on multiple grounds.

Moreover, Council Tree's claims, on which the Further Notice's proposal is based, have nothing to do with the Commission's stated goals in this proceeding. The Commission says that it "intends its small business provisions to be available only to bona fide small business," and wants to "address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities."[7] These goals go to how to ensure a DE is bona fide and that it, rather than its partners, build and provide service. They have nothing to do with placing new restrictions on the specific entities with which a DE can partner. The fact that a DE is partnering with a large wireless carrier says nothing about whether the DE is bona fide or not – any more than a DE who happens to partner with smaller entity will be bona fide.

Put another way, Council Tree's decision to partner with an investor who happens to fall below its proposed "gross revenues" threshold says absolutely nothing about whether Council Tree will or will not exercise both *de jure* and *de*

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carriers (those with revenues under $5 billion), to acquire more licenses in that auction – they simply did not.

[6] Council Tree *ex parte* at 6.

[7] Further Notice at ¶¶ 7, 10.

facto control, whether its agreements with that investor qualify under existing rules, or whether it will ever provide service to the public. Similarly, a DE can partner with a large wireless carrier, yet achieve all of the goals the Commission has set for its DE program.

There is a fatal gap between what the Further Notice's tentative proposal purports to achieve and the impact it will have. Restricting a DE's ability to partner with an incumbent large wireless carrier, but not with other wireless carriers or other companies, will have no impact on whether that DE is legitimate or whether the Commission's objectives for small businesses are fulfilled, but will only deprive DEs of access to capital from some experienced operators. If the Commission believes it is time to clamp more restrictions on DEs to provide greater assurance that those objectives are in fact achieved, the right course is not to adopt the Further Notice's proposal. Instead, the Commission should propose changes that would affect all DEs and all DE partners.

III. THE PROPOSED RESTRICTION CANNOT BE JUSTIFIED ON COMPETITIVE GROUNDS, AND WOULD CONFLICT WITH COMMISSION FINDINGS AS TO CMRS COMPETITION AND THE IMPORTANCE OF SYMMETRICAL CMRS REGULATION.

The Further Notice suggests that the proposed restriction is based in part on concerns as to spectrum aggregation, by apparently accepting Council Tree's unsupported assertion that changes to the DE rules are needed to address consolidation in the wireless industry.[8] At the outset it is critical to realize that, whatever the merits of Council Tree's assertions, they have nothing to do with the DE program. Whether or not there is a basis for the Commission to examine spectrum aggregation, modifying the DE rules in this manner will not address it. This is obvious if one considers that adopting Council Tree's proposal would not restrict it from partnering with an entity that already holds the largest block of spectrum in a market up for bid, but falls below the proposed $5 billion cap on annual revenues. Instead, the DE would be restricted only from partnering with a handful of existing companies who may hold even less spectrum in a market.

In any event, the suggestion that the proposed eligibility restriction will prevent or remedy competitive harm fails on multiple levels. As an initial matter, the Further Notice simply assumes rather than proves the existence of excessive concentration in the wireless market warranting redress.[9] Such an assumption runs contrary to repeated FCC pronouncements on the

[8] Further Notice at ¶ 8 ("Council Tree asserts that if the Commission does not limit the availability of bidding credits and other designated entity benefits [to otherwise qualified DEs having a "material relationship" with a "large, in-region, incumbent wireless service provider"], spectrum rights will be concentrated in the hands of large, incumbent wireless service providers.")(citing Council Tree *ex parte* at 2, 13-15).

[9] The Further Notice seems to base this on yet another assumption, which is that large incumbent carriers control the DEs with which they have partnered, which by definition is not true.

competitiveness of the CMRS market in the agency's annual Competition Report, including in the 2005 Report released just over four months ago. In addition, the assumption lacks any of the rigor the Commission, in reviewing a series of major wireless mergers, has required to demonstrate competitive harm warranting amelioration over the last sixteen months. Accordingly, the Commission has no lawful basis to adopt the proposed eligibility restriction.

A. Recent Commission Pronouncements Rebut Council Tree's Assertion Of Excessive Concentration in the CMRS Market.

The findings of the FCC's 2005 CMRS Competition Report contradict Council Tree's assertion of a concentrated wireless market. Section 332(c)(1)(C) of the Communications Act requires the Commission to make an annual report to Congress regarding the state of competition in the wireless industry.[10] The 2005 CMRS Competition Report, released only four months ago, flatly concludes "the CMRS marketplace is effectively competitive."[11] In contrast to Council Tree's conclusory assertions regarding the state of competition, the CMRS Report's findings flow from a detailed analysis of industry trends based on multiple data sources.

The findings of the 2005 CMRS Competition Report leave little doubt the wireless industry is vigorously competitive. By the end of 2004, most Americans

[10] 47 U.S.C. § 332(c)(1)(C).

[11] Implementation of Section 6002(b) of the Omibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Tenth Report*, FCC 05-173, 20 FCC Rcd. 15908 (rel. Sept. 30, 2005) ("2005 CMRS Competition Report") at ¶ 207.

could choose service from multiple wireless carriers – 97% lived in counties served by at least three wireless carriers and 87% lived in counties served by at least five.[12] Moreover, wireless penetration increased to 62 percent – that is, 184.7 million mobile telephone subscribers – by the end of 2004, the latest year for which figures are available.[13] This widespread adoption of wireless service, spurred by increased competition, has yielded tangible benefits to consumers. The Commission found that "competitive pressure continues to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers."[14] Competing technology offerings add an additional layer of inter-firm rivalry. As the agency found, "the deployments of next-generation networks based on competing technological standards continues to be an important dimension of non-price rivalry in the U.S. mobile telecommunications market."[15]

Given access to multiple competing providers, consumers exhibit a willingness to switch carriers to pursue better deals and new product offerings. During 2004, monthly churn rates averaged about 1.5 to 3.0 percent per month.[16] Moreover, the advent of local number portability "has lowered consumer switching costs by enabling wireless subscribers to keep their phone

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[12] 2005 CMRS Competition Report at ¶ 41.

[13] *Id.* at ¶ 161.

[14] *Id.* at ¶ 3.

[15] *Id.* at ¶ 3.

[16] *Id.* at ¶ 4.

numbers when changing wireless providers."[17] This freedom of movement, in turn, empowers consumers to "pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service."[18]

Nothing in the Further Notice discusses, let alone challenges or rebuts the 2005 CMRS Competition Report's finding of effective competition. Remarkably, in adopting a tentative conclusion in favor of Council Tree's proposed DE eligibility restriction based on concerns about concentration in the CMRS market, the Commission does not even mention the Competition Report, which was adopted after the filing of Council Tree's *ex parte*. Council Tree, for its part, did not acknowledge *any* prior CMRS Competition Report in proposing a rule change ostensibly addressing competitive concerns. Because recent precedent squarely contradicts Council Tree's position on the state of competition in the CMRS market, the Further Notice's proposed eligibility restriction lacks any record basis or policy justification.

B. Council Tree Eschews The Commission's Post-Spectrum Cap Competitive Review Methodology In Favor Of A Conclusory Analysis.

Established FCC competitive review practices stand in sharp contrast to the negligible analysis offered by Council Tree to support its proposed DE eligibility restriction on competitive grounds. Commission precedent requires

[17] *Id.* at ¶ 4.

[18] *Id.* at ¶ 4.

more than the mere assertion of competitive harm to support imposition of a regulatory restraint. This is particularly true where the restraint in question is directed to individual carriers. In the context of wireless transactions, the Commission's competitive review methodology – the fact-intensive "market-by-market" method –is settled law. Yet Council Tree proposes DE eligibility limitations applicable to only five carriers – Verizon Wireless among them – not only without market-by-market analysis but without any competitive review. Given this lack of analysis, the Commission should reject the proposed restriction.

The Further Notice's apparent acceptance of Council Tree's unsupported assertions of CMRS market concentration as a basis for policymaking runs contrary to the Commission's pattern of increasingly rigorous competitive review. With the sunset of the spectrum cap, the agency made a decisive break with an analytic approach unduly focused on a single metric – spectrum holdings – as an indicator of competitive conditions in a local market. Beginning with the Cingular/AT&T Wireless merger, the Commission introduced the data-intensive case-by-case, market-by-market method, which requires examination of all the facts and circumstances in a local market to support findings on the state of competition.[19] The same methodology was used in the ALLTEL/Western Wireless and Sprint/Nextel mergers, which were approved this past summer.[20]

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[19] Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations,

The market-by-market methodology requires a rigorous, fact-intensive review to support a finding of competitive harm. The review proceeds in two stages: (1) an initial screen that examines concentration in local CMRS markets based on Herfindahl-Hirschman Index (HHI) scores, change in HHI and aggregate spectrum holdings; and (2) a multi-factor review of all local markets that "trip" the initial screen.[21] Only after negative findings at both stages of review does the agency consider remedial action in the form of a divestiture or condition.

In contrast to a rigorous market-by-market review, the competitive analysis Council Tree offers in support of the proposed DE eligibility restriction can charitably be described as conclusory. Council Tree relies on a single data point – that the top wireless carriers serve 89% of wireless subscribers nationwide– to prove CMRS market concentration warranting remedial

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Memorandum Opinion & Order, FCC 04-255, 19 FCC Rcd. 21522 (rel. Oct. 26, 2004) ("Cingular-AWS Order") at ¶ 4 ("Thus, for the first time in this sector, we articulate and apply our public interest standard by undertaking a case-by-case analysis of a large transaction without the presence of a bright-line rule related to spectrum aggregation.")

[20] See Applications of Western Wireless Corporation and ALLTEL Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-138, 20 FCC Rcd. 13053 (rel. July 19, 2005) ("ALLTEL/Western Wireless Order") at ¶ 50; Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-148, 20 FCC Rcd. 13967 (rel. Aug. 8, 2005) ("Sprint/Nextel Order") at ¶ 62.

[21] *See* Cingular/AT&T Wireless Order at ¶¶ 106-112 ; ALLTEL/Western Wireless Order at ¶ 50; Sprint/Nextel Order at ¶ 62.

regulation.[22] Council Tree offers no market-specific analysis. Indeed, Council Tree does not even hazard a guess as to how subscribers are divided among the largest carriers – basic market share information essential to any meaningful competitive review. As Council Tree's bare representation stands, the top five carriers might have equal market shares in some or all markets – a state-of-affairs that is difficult to characterize as "concentrated," even if those carriers in total serve 89% of all wireless subscribers.

Unlike Council Tree, however, the Commission has conducted the relevant analysis, and very recently. In each of its wireless merger orders, the Commission must make a finding whether approval of the transfer is consistent with the public interest. Where competitive harms are identified, through the market-by-market methodology, the Commission can either impose remedial conditions, including divestitures, or find the merger is not in the public interest and, therefore, not approved.[23] In October 2004, the Commission approved the Cingular/AT&T Wireless merger subject to limited divestitures.[24] In July of 2005, the Commission approved the ALLTEL/Western Wireless merger, again, subject to limited divestitures.[25] Finally, in August of 2005, the Commission

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[22] Council Tree *ex parte* at 2.

[23] *See* Cingular/AT&T Wireless Order at ¶¶ 40-43; ALLTEL/Western Wireless Order at ¶¶ 17-21; Sprint/Nextel Order at ¶ 20-23.

[24] Cingular/AT&T Wireless Order at ¶¶ 269-270.

[25] ALLTEL/Western Wireless Order at ¶ 170.

approved the Sprint/Nextel merger without any divestitures.[26] In each case, the Commission held that, as conditioned, the merger was in the public interest and did not result in competitive harm (i.e., excessive concentration).

In focusing on allegations of "consolidation" at the national level, the Further Notice is in direct conflict with the Commission's repeated conclusion that analyzing CMRS competition is properly done at the local – not the national – level. Each time the Commission has recently viewed mergers and other transactions involving consolidation of CMRS spectrum, it has determined that the relevant market is local, not national, and has rejected claims that it should examine national market shares.[27]

In the face of these repeated Commission findings, after rigorous competitive analysis, of a competitive CMRS market – findings consistent with the 2005 CMRS Competition Report – Council Tree offers a bald assertion of excessive concentration in support of its proposed DE eligibility restriction. The Commission should reject this proposed restriction as completely unsupported and, to the extent it is designed to address consolidation in the CMRS market, a solution in search of a problem.

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[26] Sprint/Nextel Order at ¶¶ 184-185.

[27] *E.g.,* Cingular/AT&T Wireless Order at ¶¶ 82-90; ALLTEL/Western Wireless Order at ¶¶ 32-36; Sprint/Nextel at ¶ 51: "We find that the relevant geographic market for analyzing the competitive effect of this transaction on mobile telephony is local. This finding is primarily rooted in the premise that consumers obtain their wireless service in a local area, not on a national basis."

C. The Restriction Would Create Competitive Asymmetries in Violation of Federal Policy that Symmetrical Regulation Serves the Public Interest.

A rule that restricts spectrum aggregation by penalizing certain carriers that already have spectrum would also be in direct conflict with Congressional and Commission findings that a symmetrical regulatory structure best serves the public interest. Where there are demonstrated market failures or other harms not addressed by competitive market forces, rules targeting certain competing carriers or certain practices may be justified. But the Further Notice documents no such facts. There can be no lawful basis for departing here from the principle of regulatory symmetry by restricting a handful of wireless carriers and their DE partners, while leaving other entities exempt from that restriction.

Congress's 1993 amendments to Section 332 of the Communications Act, the Commission has declared, "mandated that similar commercial mobile radio services be accorded similar regulatory treatment under the Commission's Rules. The broad goal of this action is to ensure that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace. … Our first goal is to create a symmetrical regulatory framework for commercial mobile radio services in order to foster economic growth and expanded service to consumers through competition."[28] The Commission has correctly, and repeatedly, recognized over the past decade that subjecting some

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[28] Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order,* GN Docket No. 93-252, 9 FCC Rcd 7988 (1994), at ¶¶ 4, 23.

competing wireless providers to restrictions that do not apply to their competitors, absent a "clear cut need," would distort the market and deprive consumers of the benefits of an open marketplace.[29] The Further Notice fails to come close to demonstrating the requisite clear cut need for new restrictions on only DE applicants for spectrum that partner with specific carriers.

IV. IF THE COMMISSION DECIDES TO RESTRICT DE INVESTMENT, IT SHOULD DO SO BROADLY AND EQUITABLY.

Chairman Martin correctly flags the inappropriateness of imposing a restriction only on DEs who seek to partner with a handful of wireless carriers. He states, "Why single out large wireless carriers alone for this kind of treatment and allow large wireline carriers, cable companies, satellite providers, and other communications companies to continue to participate in a program for small businesses?"[30] If the Commission decides to reform the program, it should further limit small business discounts, by not permitting a DE with *any* large company investment, not just communications company investment, to take advantage of such discounts. To the extent that the Commission is concerned that it is unable through its own review and enforcement proceedings to "address any concerns that our designated entity program may be subject to

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[29] *E.g.,* Petition of the Connecticut Dep't of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order,* 10 FCC Rcd. 7025 (1995), at ¶10, aff'd, Connecticut Dep't of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

[30] *See Statement of FCC Chairman Kevin J. Martin* to Further Notice at 1.

potential abuse from larger corporate entities,"[31] it should apply the restriction broadly to investment from all large companies.

Even if the Commission does limit investment in DEs, there are several problems with the proposal as envisioned. In the first place, Council Tree proposes that for purposes of determining significant geographic overlap in defining an in-region incumbent wireless service provider, the Commission should "apply the standard set forth in Section 20.6(c) of the Commission's rules,"[32] as though the standard currently exists. The Commission chose to sunset the spectrum cap, and thus that standard, on January 1, 2003.[33] Should the Commission resurrect its geographic overlap "standard," it cannot simply re-adopt the old rule. It would need to review anew the appropriateness of the original overlap definitions in light of current market conditions. The Commission made its original spectrum cap decision in a substantially different spectrum environment, one in which there were only two cellular providers and 50 MHz available in each market. Here the Commission would limit certain DEs' access to spectrum even though there is approximately 190 MHz available

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[31] Further Notice at ¶ 10.

[32] Further Notice at ¶ 18 ("Council Tree proposes that for purposes of determining significant geographic overlap in defining an in-region incumbent wireless service provider, the Commission should apply the standard set forth in Section 20.6(c) of the Commission's rules. Although the CMRS spectrum aggregation limit sunset on January 1, 20003 [citation omitted], Section 20.6 defined significant overlap of geographic service areas for the purposes of that limit . . . .")

[33] *See gen.* 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001).

in every market and the Commission's own analysis shows that the vast majority of Americans have access to at least five wireless providers. In addition, the Commission will auction at least an additional 150 MHz of spectrum over the next two years.[34] Unlike the previous rule, which capped the amount of spectrum a carrier and its affiliate were permitted to hold,[35] the Commission appears to contemplate a wholesale bar on the DE's access to bidding credits, no matter how limited the investor's holdings in the overlapping markets. If anything, the substantial increase in the availability of "new" spectrum would counsel against any new restrictions.

Second, if the Commission is concerned about winning bidder payments to the U.S. Treasury being reduced,[36] then the Commission should not permit *any* large company to partner with a DE. The impact of bidding credits on payments to the Treasury flows from the DE program itself, not from the fact that some DEs partner with particular investors. Put another way, "auction revenues to the U.S. Treasury could potentially be reduced by billions of dollars"[37] as a result

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[34] The Commission will auction 90 MHz of spectrum in the Advanced Wireless Services Auction and 30 MHz each in the yet-to-be-scheduled 700 MHz Upper and Lower Band Auctions.

[35] Under the now-repealed spectrum caps, the Commission affirmatively encouraged incumbent carrier investment in DEs by having less stringent ownership limitations for DEs with incumbent carrier investment than for non-DEs with such investment, a policy that is in direct conflict with the approach of the Further Notice. *See 47 CFR §* 20.6(d)(2) (repealed).

[36] Adelstein Statement at 2.

[37] *Id.*

of relationships between DEs and *any* large companies. The answer is to restrict any large company's involvement, not target a handful of entities.[38]

Finally, the choice of a $5 billion revenue threshold is completely arbitrary, with no factual or public interest basis.[39] The Further Notice requests comment on the Council Tree proposal that large, in-region, incumbent wireless providers should be defined, in part, as those having "average gross wireless revenues" for the preceding three years exceeding $5 billion.[40] Under such a regime, DEs with strategic investment from a companies with "gross wireless revenues" falling just below the $5 billion threshold should be considered small enough to avail themselves of government benefits that would be forbidden to DEs with "large" carriers relationships. It is difficult to imagine any scenario under which a company with a revenue stream that would place it well within the Fortune 500 would be considered "small." Furthermore setting such an artificial threshold seems to suggest that a greater potential for abuse exists in relationships with companies above $5 billion, which is obviously unfounded and unsubstantiated.

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[38] The Commission should also be mindful of Section 309(j)(7)(A) of the Communications Act, 47 U.S.C. § 309(j)(7)(A), which expressly restricts it from considering the amount of revenues received from competitive bidding in making its public interest determinations in adopting rules for the conduct of auctions.

[39] It is doubtful that Council Tree would have pursued its "reforms" had it been successful prior to Auction No. 58 in its efforts to align with a "large incumbent carrier." Coincidently, now that it is in a partnership with Leap, which has gross wireless revenues below $5 billion, it would like to preclude other DEs from partnering with those carriers.

[40] Further Notice at ¶17.

If the Commission wishes to set such a threshold for strategic investment in DEs, it should set the standard at the level it adopted for the Entrepreneurs' Block, that is, $125 million in revenues measured over the preceding two years. As the Commission indicated in its Orders adopting the Entrepreneurs' Block, though the threshold is higher than those used by the Small Business Administration,[41] the capital intensive nature of the wireless business supports the adoption of a higher standard in some instances. While the DE would still be required to meet the lower revenue thresholds to take advantage of any discounts, it could acquire investment from any company that met the Entrepreneurs' Block test.

V. CONCLUSION

Verizon Wireless urges the Commission not to adopt the Council Tree proposal to restrict DE relationships with certain wireless companies. Should the Commission determine that a restriction on DE investment is warranted to ensure that only bona fide DEs benefit

[41] *See* http://www.sba.gov/size/sizetable2002.html. These thresholds have been modified since the Commission first adopted its small business rules in 1993, but the revenue thresholds still all fall well below $125 million.

from its small business policies, it should restrict investments by any entities whose gross revenues exceed $125 million annually.

Respectfully submitted,

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